MOTION FILED
DEC - 7 1981

No. 81-38

IN THE

Supreme Court of the United States

October Term, 1980

MARY ELLEN CRAWFORD, a minor, etc., et al.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

On Appeal from the California Court of Appeal

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF;
BRIEF OF AMICUS CURIAE

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No. 81-38

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Petitioners,	)
vs.	)
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,	)
Respondent.	)

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

California Teachers Association/ National Education Association (hereinafter "CTA") respectfully moves this Court for leave to file the accompanying brief as amicus curiae. The attorneys for petitioners and the attorneys for respondent have given their consents (attached hereto) to CTA for its filing of a brief as amicus curiae.

Applicant's interest in this case is that, as the largest certificated employee labor union in California, having 152,000

members in California and representing 212,000 teachers in their employment relations with California public school districts, it has, from the very genesis of the initiative process which resulted in the amendment of Article I, Section 7(a) of the California Constitution (the "Robbins Amendment" adopted November 7, 1979), through its State Council of Education, its Board of Directors, and its Civil Rights in Education Committee(s), opposed the public policy purpose underlying the Robbins Amendment. That purpose was, and remains, to discourage desegregation of California public schools. More specifically, CTA's intent in this case is to urge the Supreme Court of the United States to find the Robbins Amendment unconstitutional, to the end of affording California's judiciary the power, which it is obligated to exercise under the United States Constitution, to endeavor to remedy segregation in California public schools.

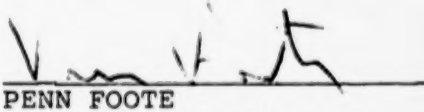
The brief of petitioners herein filed with the California Court of Appeal, in Crawford v. Board of Education of the City of Los Angeles (1980) 113 C.A.3d 633, 170 Cal. Rptr. 495, California Supreme Court hearing denied March 11, 1981, is inadequate in addressing the question of the unconstitutionality of the Robbins Amendment, in that petitioner's brief does not address the problem of the conflict between the Robbins Amendment and the principle of judicial review. Judicial review is the supreme law of the land, within the meaning of that phrase in Article VI of the United States Constitution.

Applicant's brief argues that the Robbins Amendment is in violation of the Supremacy Clause of the United States Constitution in that it takes away from our courts the power of judicial review of the pupil assignment plans; that the doctrine of judicial review, being the supreme law of the land under

Article VI, must attach to the jurisdiction and authority even over California courts with regard to California's constitutional amendments.

Dated: November 25, 1981

Respectfully submitted,



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November 3, 1981

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RE: Crawford v. Board of Education of the City of Los Angeles, No. 81-38 USSC, Oct. Term 1980

Dear Mr. Foote,

Consent is hereby given on behalf of the petitioners in the above case for the California Teachers Association to file a brief amicus curiae.

Sincerely yours,

Fred Okrand

FO/LH

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BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,	)
Respondent.	)

BRIEF OF AMICUS CURIAE

QUESTION PRESENTED

Did the California Court of Appeal err in holding that the amendment of Article I, Section 7(a) of the California Constitution (the "Robbins Amendment") was not unconstitutional? More specifically, is the Robbins Amendment unconstitutional, as being in violation of the Supremacy Clause of the United States Constitution, in that it takes away from the courts of the State of California their power of, and duty to exercise, judicial review?

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Corwin, John Marshall and The Constitution, A Chronicle of the Supreme Court (Vol. 16, The Chronicles of America Series, Abraham Lincoln Allen Johnson, Editor, Yale University Press, 1919)	7, 8
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Smith, The Constitution, A Documentary and Narrative History (William Morrow and Company, Inc., 1978)	6
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OTHER:

16 C.J.S., Constitutional Law, Section 92 8

16 Cal.Jur.3d, Courts, Section 19 . 9

INTEREST OF CALIFORNIA TEACHERS ASSOCIATION/NATIONAL EDUCATION ASSOCIATION

California Teachers Association/National Education Association ("CTA") is a non-profit mutual benefit corporation, a labor union, organized under the laws of the State of California and composed of certificated employees who teach in California public schools.

Among CTA's objectives are:

> "To represent employees of public school employers in their employment relations with such employers; /and/
>
> "To further the educational interests of the State of California, to give increasing efficiency to its school system, to secure and maintain for the office of teaching its true rank among the professions of the state, to furnish a practicable basis for united action among those devoted to the cause of education in the state . . ." (California Teachers Association Articles of Incorporation, Article Second)

In accordance with the foregoing general objectives, CTA, through its Board of

Directors, its State Council of Education, and its Board and State Council Committees on Civil Rights, has historically supported the desegregation of black and white pupils in the public schools of California. Pursuant to that latter objective, CTA opposes the passage of the Robbins Amendment (the initiative proposal which, when passed by the voters of California on November 7, 1979, became an amendment to California Constitution, Article 1, Section 7(a)) and continues to oppose in principle the implementation of the Robbins Amendment.

The Robbins Amendment was passed for the express purpose of effecting, and will effect, the handicapping of the courts of California, in their adjudicating of the federal constitutionality of desegregation plans formulated by California school districts.

SUMMARY OF ARGUMENT

The decision of the California Court of Appeal in Crawford v. Board of Education of

the City of Los Angeles below, if left undisturbed, would mean that the courts of California would have no choice, in adjudicating school district desegregation plans (which are legislative acts), but to apply the standard for adjudicating the adequacy of such plans which has been adopted by the federal courts. Such a limitation upon the adjudicative duty of the California courts is a denial of the California judiciary's right (and obligation), under the United States Constitution, of judicial review.

ARGUMENT

I

THE PRINCIPLE OF JUDICIAL REVIEW IS AN INHERENT PART OF THE UNITED STATES CONSTITUTION.

In Marbury v. Madison (1803) 1 Cranch 137, 2 L.Ed. 60, Chief Justice Marshall asked the question:

> "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.

> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed to those intended to be restrained?" (2 L.Ed., 73).

Chief Justice Marshall's question answered itself. But lest there be any misunderstanding, Marshall went on to state: "It is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it." (Ibid.)

Then followed Marshall's statement of judicial review:

> "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on.
>
> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and

interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

"So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty." (2 L.Ed., 73-74)

There is a difference of opinion among commentators upon the principle of Marbury v. Madison as to whether or not judicial review of legislative acts is a part of the United States Constitution, or merely Marshall's interpretation of it. Albert J. Beveridge, in The Life of John Marhsall (Houghton Mifflin Co., 1919), noting the Constitutional Convention's "brief and scattering debate" (Vol. III, Beveridge's Life, p. 114), said that no resolution conclusively deciding the question of judicial review was ever even presented to the Convention's members. But of the

proposition that judicial review, with Marbury v. Madison, is an intrinsic part of the United States Constitution, Beveridge had no doubt:

> "Such was the record of the Constitutional Convention when, by his opinion in Marbury v. Madison, Marshall made theprinciple of judicial supremacy over legislation as much a part of our fundamental law as if the Constitution contained these specific words: the SupremeCourt shall have the power to declare invalid any act of Congress which, in the opinion of the court, is unconstitutional." (Id., p. 116).

Beveridge thus speaks of Marshall as "establishing" judicial review (Ibid.).

By way of contrast, Smith, in The Constitution, A Documentary and Narrative History (William Morrow and Company, Inc., 1978) states:

> "What is one to say of Marshall's decision? A piece of intellectual legerdemain? A sleight of hand, or rather of mind? A conjurer's trick? All great art may be said to contain something ofthe trickster, the magic illusionist. Marbury v. Madison is perhaps the most famous case in American constitutional history, rivaled only by the Dred Scott decision and,

in modern times, Brown v. Board of Education. It was not that Marshall established some new constitutional principle. The Court had already in Hayburn's Case stated that laws passed by Congress contravening, in the opinion of the justices, the Constitution, were invalid." (Smith, The Constitution, p. 322).

Edward S. Corwin, John Marshall and The Constitution, A Chronicle of the Supreme Court (Vol. 16, The Chronicles of America Series, Abraham Lincoln Edition, Allen Johnson, Editor, Yale University Press, 1919) says:

"Every one of his arguments in this opinion in support of judicial review will be found anticipated in the debate on the Repeal Act. What Marshall did was to gather these arguments together, winnow them of their trivialities, inconsistencies, and irrelevancies, and compress the residuum into a compact presentation of the case which marches to its conclusion with all the precision of a demonstration from Euclid." (Corwin, op. cit., p. 67).

And:

"There is not a false step in Marshall's argument. It is, for instance, not contended that the language of the

> Constitution establishes judicial review but only that it 'confirms and strengthens the principle.'" (Corwin, ibid.)

But whether "invented" with Marbury v. Madison, or "presented" in that case, the doctrine of judicial review is a part of our fundamental law, fully as though specifically set forth in the United States Constitution (16 C.J.S., Constitutional Law, Section 92).

II

JUDICIAL REVIEW IS THE SUPREME LAW OF THE LAND, WITHIN THE MEANING OF THAT PHRASE IN ARTICLE VI OF THE UNITED STATES CONSTITUTION.

The Supremacy Clause, Article VI of the United States Constitution, reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Inasmuch as judicial review is an inherent part of the United States Constitution, and the Constitution is the supreme law of the land, it follows that judicial review is the

supreme law of the land. Even standard California authority recognizes this to be so:

> "Generally, under the doctrine of separation of powers, nonjudicial bodies may not exercise judicial powers, nor may the courts exercise nonjudicial powers. However, although the legislative and executive departments of government may not interfere with the functions of the judiciary, it nevertheless is the province of the courts, as the ultimate guardians of the constitution, to nullify unconstitutional enactments of the legislature, as well as executive actions taken under the authority of such unconstitutional enactments. (16 Cal.Jur.3d, Courts, Section 19, at p. 37 /citations omitted/)

III

THE PRINCIPLE OF JUDICIAL REVIEW, BEING THE SUPREME LAW OF THE LAND UNDER ARTICLE VI OF THE UNITED STATES CONSTITUTION, MEANS THAT CALIFORNIA COURTS HAVE THE DUTY INDEPENDENTLY TO JUDGE THE FEDERAL CONSTITUTIONALITY OF CALIFORNIA LEGISLATION.

Not even by their democratic initiative process (whereby Californians themselves undertake to amend their State Constitution) may the voters of California deprive the courts of California of the obligation of those courts, under the Supremacy Clause of

Article VI (as it incorporates judicial review), to judge.

Garry Wills, in Explaining America: The Federalist (Doubleday & Company, Inc., 1981), writes:

> " . . . Madison argues in The Federalist for a view of fundamental law that entails judicial review of necessity. He does this in No. 53.
>
> "At the end of No. 52, Madison makes a surprising remark--surprising because it seems to take away supremacy with one hand while bestowing it with the other:
>
> " . . . the Foederal Legislature will possess a part only of that supreme legislative authority which is vested completely in the British parliament (52.358).
>
> "This not only raises the classical sovereignty question--how can supremacy be partial? It might also cause one--since the legislature and the legislative power are at times used synonymously in The Federalist--to look for some partial sharing of supremacy on the part of the executive or the judiciary." (Explaining America, at 156).

Wills then explains that in America (vs. England) the Constitutional Convention ("ratifying convention"), passed the

Constitution ("fundamental law"), such that the Congress (or any other legislative body) cannot alter the Constitution. Wills expresses it thusly:

> "Fundamental law is superior in its claims to mere statute. Yet there will be no way of asserting that paramountcy if the Court does not decide between new laws and the fundamental law. Who else is to judge? . . ." (Explaining America, supra., at 157).

Unhappily, this profound distinction--"so well understood in America"--is not understood in California. By the Robbins Amendment, Californians have "changed . . . /one/ of the most fundamental articles of the government"--the principle of judicial review, as set forth in Marbury v. Madison.

It is no defense of the Robbins Amendment that it was passed by the voters of California, through the initiative process. California Constitution is not a "paramount constitution." (Reitman v. Mulkey (1967) 387 U.S. 367) The only paramount constitution is the United States Constitution, and a

California constitutional provision which is repugnant to the United States Constitution must fall.

IV

THE ROBBINS AMENDMENT TAKES AWAY FROM THE COURTS OF CALIFORNIA THEIR DUTY, AND POWER, TO JUDGE THE FEDERAL CONSTITUTIONALITY OF STATE LEGISLATION.

"ARTICLE 1. DECLARATION OF RIGHTS.

"Section 7. Due process and equal protection; pupil school assignment and transportation

"(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws, provided, that nothing contained herein or elsewhere in this Constitution imposes upon theStateofCalifornia or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a

> violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court wouldbe permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution." (170 Cal.Rptr., at 497)

By the above provision, the California Constitution purports merely to limit the power of California courts to fashion remedies for school segregation. But since courts exist, not merely to render fine-spun declarations of rights, but to adjudicate rights and enforce them, the Robbins Amendment's limitation upon the courts' power to formulate remedies is, in truth, a limitation upon the courts' power of acting as courts. In mandating that California courts (with respect to the school desegregation) shall exist for no purpose other than to mirror the desegregation decisions of federal courts, the Robbins Amendment destroys the very essence of

judici-l review--the power, and obligation, to apply the Constitution of the United States to school district desegregation plans and (if such be the case) find such plans unconstitutional under the United States Constitution.

No one can seriously dispute the fact that the Robbins Amendment was passed by the voters of California for the very purpose of destroying the de facto standard of adjudicating school district desegregation plans which the California Supreme Court fashioned in Crawford I (see 113 C.A.3d, 647; 170 Cal.Rptr., 504

But for the power of the Supreme Court of the United States to hold unconstitutional the Robbins Amendment, that amendment will succeed in having proved W. E. Burghardt Du Bois wrong, when he said:

> "I believe that all men, black and brown and white, are brothers, varying through time and opportunity, in form and gift and feature, but differing in no essential particular, and alike in soul and the possibility of infinite development.*

"*From Darkwater by W. E. B. Du Bois (New York: Harcourt, Brace & World, 1920; reprinted by Schocken Books, New York, 1969)." (As quoted in Mary White Ovington, The Walls Came Tumbling Down (Harcourt, Brace & World, 1947, Schocken Paperback Edition, 1970, at p. 299).

CONCLUSION

If the independence of the California judiciary, required by the United States Constitution, is to be restored in the area of school desegregation, the Robbins Amendment must be struck down.

Omnia alia perfugia bonorum, subsidia, consilia, auxilia, jura ceciderunt. Quem enim alium appellem? quem obtester? quem implorem? Nisi hoc loco, nisi apud vos, nisi per vos, judices, salutem nostram, quae spe exigua extremaque pendet, tenuerimus; nihil est praeterea quo confugere possimus.

Dated: November 25, 1981

Respectfully submitted,

PENN FOOTE
Counsel for California Teachers Association

PROOF OF SERVICE--AFFIDAVIT

I, PENN FOOTE, Corporate Counsel of the California Teachers Association, am the attorney of record for amicus curiae herein.

I depose and say that on the 27th day of November, 1981, I served a copy of the foregoing Application For Leave To File Amicus Curiae Brief and Brief of Amicus Curiae on the parties named below, by mailing the same to the individuals named below, at the offices and addresses stated below.

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PENN FOOTE

SUBSCRIBED AND
SWORN TO before me
this ___ day of November, 1981.